United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4151

76-4153

United States Court of Appeals
FOR THE SECOND CIRCUIT

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

against

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK,

Intervenor.

B
P/S

Petition For Review Of Orders Of Federal Power Commission

BRIEF FOR PETITIONERS TOWN OF DURHAM AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY

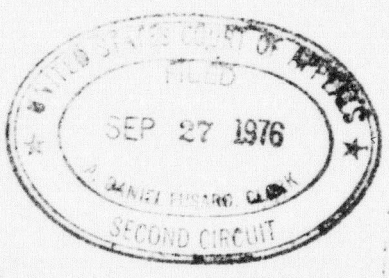

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TABLE OF CASES AND AUTHORITIES

UNITED STATES COURT OF APPEALS
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Docket Nos. 76-4151, 76-4153

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-against-

FEDERAL POWER COMMISSION,

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POWER AUTHORITY OF THE STATE OF NEW YORK,

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BRIEF ON BEHALF OF PETITIONERS TOWN OF DURHAM AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY

Preliminary Statement

This brief, in these consolidated appeals, is submitted in support of the petition of the Town of Durham, New York ("Town of Durham") and the Association For The Preservation Of Durham Valley ("Association") (collectively the "Durham Petitioners), in appeal No. 76-4153, for review of

the final order of the Federal Power Commission (the "Commission") dated January 29, 1976 (Op. No. 751) (R 7297, A 64)* respecting the payment of expenses and fees to Petitioners. The Commission, on this issue, ruled: ". . . we do not find that Intervenors [Durham] here have made a case for an award of expenses and fees even if we had the authority to make such an award." (R 7319, A 85.) An opinion and order of the Commission (Op. No. 751-A) denying Petitioners' petition for rehearing of Opinion 751 was issued on April 27, 1976 (R 7347, A 110).

The Durham Petitioners are financially impoverished. Their attorney has spent over 1,000 hours of professional time in this seven-year contested proceeding, and has incurred thousands of dollars of disbursements -- without a penny of recompense -- all in the public interest.

The Durham Petitioners have significantly contributed to the Commission's decision-making process. Among other things, they were instrumental in having the

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* The prefix "R" denotes record citations. The pagination follows that set forth in the Certificate of Record in Lieu of Record. The prefix "Tr." denotes a reference to the hearing transcript which comprises the first 4,047 pages of the record. The prefix "Ex." denotes a reference to Exhibits received at the hearing. A deferred joint appendix will be filed, pursuant to this Court's Civil Appeal Scheduling Order No. 5. The relevant opinions and orders of the Commission and the Initial Decision of the Administrative Law Judge will be included in the deferred joint appendix. The prefix "A" are to pages of the deferred joint appendix.

Commission not adopt a transmission line route which was preferred by the Commission's Staff and the Power Authority. The Durham Petitioners' petition for review was filed with this Court pursuant to Section 313(b) of the Federal Power Act (16 U.S.C. § 8251(b)).

Issues Presented for Review

The issues presented to this Court for its review are:

1. Whether, under the circumstances of this case, the Commission's January 29, 1976 order denying the Durham Petitioners' application for the payment of certain expenses and fees may stand.

2. Whether the Commission erred in ruling that it lacked the authority to grant the Durham Petitioners' application for expenses and fees.

3. Whether the Commission's finding and conclusion that the Durham Petitioners have not "made a case" for the award of expenses and fees is supported by the record of this seven-year proceeding.

Prior Proceedings in This Court

Two prior decisions of this Court, in which the Durham Petitioners were parties, review many of the back-

ground facts of the instant petition. These opinions are: Greene County Planning Board v. F.P.C., 455 F.2d 412, cert. denied, 409 U.S. 849 (1972) ("Greene County I"), and Greene County Planning Board v. F.P.C., 490 F.2d 256 (1973) ("Greene County II").

Statement of the Case

In June 1969, the Commission granted a license to the Power Authority of the State of New York ("PASNY") to construct and operate a pumped storage power facility in Schoharie County, New York, including as part of the project works three 345 kilovolt, high towered transmission lines (R 5648). While the license authorized construction of the project generally, it specifically prohibited construction of the transmission lines until the Commission had an opportunity to examine a number of issues, including the environmental impact which any such lines might have.

In November 1969, PASNY applied for authorization to construct the three transmission lines, one of which was to run from Gilboa, in Schoharie County, through the Town of Durham and the heart of the Durham Valley to a location near Leeds, in Greene County, New York (the "Gilboa-Leeds line") (R 7602). The proceedings (Project No. 2685) relating to such application and amendments

thereto are hereinafter referred to as the "proceeding." Durham Petitioners filed a petition for leave to intervene in the proceeding to prevent, by offering evidence regarding the environmental impact of the high towered transmission lines, the despoliation of Durham Valley (R 5723).

In May 1970, the Commission granted Petitioners leave to intervene, recognizing that their contribution to the proceeding "may be in the public interest" (R 5737).

In December 1970, PASNY filed an amended application with the Commission for the routing of the Gilboa-Leeds line. It proposed a Route A, which, like the route proposed in its prior application, would pass through the Durham Valley area, and it also proposed an alternate, Route B, which would pass through other areas in Greene County (R 5739). On January 13, 1971, the Commission promulgated notice of PASNY's amended application (R 5756).

On March 26, 1971, PASNY filed its Environmental Report with the Commission in purported compliance with the National Environmental Policy Act (R 4269).

Petitioners subsequently submitted their Statement of Environmental Position, in which they opposed the construction, routing and design of the Gilboa-Leeds line along Route A and questioned whether there was need for

the line. Petitioners argued that, contrary to PASNY's contentions, a transmission line over proposed Route A, and particularly through Durham Valley, will have a significant adverse impact on the environment of the area; will be destructive of the unique scenic beauty of the area; and will dramatically destroy its historic ambiance (R 6023).

Thereafter, Durham Petitioners, together with the Greene County Planning Board ("Planning Board"), sought review in this Court of the Commission's orders which rejected Petitioners' contention that the Commission had abdicated its responsibilities under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., by substituting PASNY's environmental impact statement for its own. This Court in Greene County I found that the Commission had not complied with NEPA and remanded for further proceedings. This Court also noted, in its summary of various applications by Petitioners before the agency, that: ". . . we are constrained to note that the Commission at nearly every turn has made it difficult procedurally for the intervenors." (455 F.2d at 417, n.12.)

In Greene County I, the Durham Petitioners also requested an order requiring the Commission, or in the alternative PASNY, to pay reasonable out-of-pocket expenses,

including fees for experts, and reasonable attorneys' fees at the conclusion of the hearing. On this application, the Commission argued that Durham's application was premature and it "left open the question of whether ultimately to award them [fees] when the proceedings have come to an end." (455 F.2d at 425.) The Court, on this issue, agreed with the Commission's "position that at this posture of the proceedings and under current circumstances, without a clearer congressional mandate we should not order the Commission or PASNY" to pay petitioners' fees and expenses (455 F.2d at 426). The Court also noted:

> "Whether or not Mills [Mills v. Electric Auto-Lite Co., 396 U.S. 375] could support such an award as petitioners seek without a more specific congressional mandate, we do not find compelling need for it at this point, in view of our direction as to the role required of the Commission here." 455 F.2d at 427 (emphasis added).

Proceedings After Greene County I

After this Court's decision in January 1972, the Commission sought review in the Supreme Court of the United States, which was denied (409 U.S. 849). Thereafter a draft Environmental Impact Statement ("EIS") was prepared and circulated (R 6253), and subsequently a final EIS was prepared by the Commission and made available in May 1973 (Ex. 71, R 4565).

Petitioners claimed that the draft EIS was deficient in material respects. Applications for corrective action on this point were made to the Administrative Law Judge and to the Commission, which were denied (R 6521, 6570, 6709, 6793, 6927, 6997). This Court in Greene County II, over the vigorous dissent of Judge Mansfield, denied Petitioners' motion for a stay of the agency proceedings until a comprehensive impact statement was prepared.*

Durham's Participation in the Administrative Hearings

A. Route Location

The issue of route location for the Gilboa-Leeds line was one of the central issues in the case. In its December 2, 1970 submission to the Commission, PASNY proposed routings for the 345 Kv line were either to be over its delineated Route A or Route B (R 5739). In its submission PASNY indicated that either Route was acceptable to it. However, during the hearings PASNY preferred Route A,

* Judges Mansfield, Oakes and Timbers dissented from Petitioners' petition for rehearing and suggestion that the action be reheard en banc (Order dated March 22, 1974).

identifying it as the "optimum route." (Tr. 225).* Modifications were made to these routings by PASNY and they were designated Routes A-1 and B-1 (Ex. 55A, B, C, R 4474). The Commission's Staff also proposed modifications to the A-1 and B-1 routes. In its final Environmental Impact Statement, the Staff concluded that it preferred Route A-1, as modified by it (Ex. 71 (p. 179), R 4565 et seq.).

B. Durham's Position on Route Location

From the outset of this case in 1969, the Durham Petitioners have continuously maintained that a Route A or A-1, with either the Commission Staff or PASNY modifications, would be an environmental and cultural disaster (R 6023, 4903). It took enormous expenditure of time and money to convince the decision-makers of the soundness of Durham's position.

In the hearings before the Administrative Law Judge, the Durham Petitioners produced highly qualified expert witnesses from a spectrum of disciplines (land use, regional planning, historical, conservation) to demonstrate, beyond

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* PASNY, in its September 24, 1976 Response to Greene County Planning Board's Motion for a Stay in these appeals, notes: "The Authority took the position that either A or B would be a satisfactory route but that A was the better of the two." (p. 31).

doubt, that a transmission line through the Durham Valley (i.e., along Route A or A-1) would be devastating. These experts were: David Lowenthal, Professor of Geography at University College in London and an eminent lecturer and writer on land use, geography, environmental management and landscape evaluation (Tr. 3028 et seq.); (ii) Narendra Juneja, Assistant Professor in the Department of Landscape Architecture and Regional Planning in the Graduate School of Fine Arts of the University of Pennsylvania, recognized by the Commission Staff as "one of the distinguished architects in this country" (Tr. 3636 et seq., Tr. 3763); (iii) John Hightower, former director of the Museum of Modern Art and former Executive Director of the New York State Council on the Arts (Tr. 3229 et seq.); (iv) Vernon Haskins, the Town Historian for the Town of Durham (Tr. 3346); (v) David Erdmann, a history teacher who prepared a study on the Susquehanna Turnpike* (Tr. 3286 et seq.); and (vi) Brooks Atkinson, a noted conservationist and naturalist, who was also an Intervenor (Tr. 3197 et seq.). Durham also assisted in the presentation of Intervenor Sierra Club expert

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* The Turnpike would have been bisected with a Route A transmission line. Durham brought to hearing notice of the highly material fact that the Turnpike was nominated for and subsequently placed on the National Register of Historic Places (Exs. 81, 100, R 4939, 5045).

witness Alan Gussow, a professional artist, lecturer and writer on conservation and the arts (Tr. 3399 et seq.).

In addition to the expert witnesses, the Durham Petitioners prepared, assembled and introduced in evidence a multitude of documents, studies, photographs and slides -- all demonstrating the unique scenic, historical and cultural aspects of the Durham Valley (e.g., Exs. 98-111, 153A-K, 154, 155A-T, 156-161; R 5013-5125, 5360-5428).

C. Durham's Application for Fees and Expenses

The Durham Petitioners in this proceeding, since 1971, have sought: (i) reimbursement for out-of-pocket expenses incurred on Petitioners' behalf; (ii) reimbursement for experts' fees and expenses incurred on their behalf; and (iii) payment of a reasonable attorneys' fee to their counsel and reimbursement of out-of-pocket expenses and disbursements incurred by counsel (R 5840, 5930).

An affidavit of the Durham Petitioners' inability to finance this seven-year proceeding, with the attendant intermediate reviews in this Court, was filed with the Commission (R 5930). In the 1972 Town budget for the Town of Durham, a total of only $800 was allocated for all legal services and expenses (R 6137, Aff't of Town Supervisor). There has been no material change since 1972.

Hearings in this proceeding were held during the period June 22, 1971 to September 19, 1973. There were 24 hearing days in Washington, D.C. or Albany, New York. Counsel for the Durham Petitioners, with one exception because of illness, attended all sessions.

Well over 1,000 hours of attorneys' time has been devoted to the proceeding. Thousands of dollars of unreimbursed expenses have been incurred.

The Administrative Law Judge's Decision on Route Location and on Fees and Expenses

On July 1, 1974, Administrative Law Judge Levy rendered his Initial Decision (R 7033, A 1-63). He concluded that the proposed Gilboa-Leeds transmission line should not be built along Route A, either as modified by PASNY or the Staff. In reaching this conclusion, Judge Levy unequivocally determined that "[t]he most scenic, aesthetic, historical, and cultural values in the impact area are found in the Durham Valley [traversed by Route A] and along the Susquehanna Turnpike looking south to the northern rim of the Catskills." (R 7033 et seq., A 16.) A transmission line erected along Route A would be, he found, damaging to these essential values.

Each of the experts produced at the hearing by Durham was of undoubted assistance to the Administrative

Law Judge in his determination and evaluation on the routing of the proposed line. Indeed, the Commission's Staff noted with approval the "contributions" and "new insights . . . as to the unitary character of Durham Valley . . ." which were provided by the Durham expert witnesses (Staff Reply Brief to the Administrative Law Judge, 4/24/74, pp. 13, 24).

On reimbursement of Durham's expenses and on payment of fees, the Administrative Law Judge again rejected Durham's application (R 7033, A 28).

The Commission's Opinion No. 751

The Commission affirmed and adopted the initial decision of the Administrative Law Judge "as the decision of the Commission." (R 7297, A 65.) On route location the Commission agreed with Judge Levy's "choice" of Route B-1 and his conclusion that the "most scenic aesthetic, historical, and cultural values in the impact area were found in the Durham Valley and along the Susquehanna Turnpike" and, accordingly, "for environmental reasons" Route A-1 was not a desirable route (R 7297, A 76, 78, 85).*

The Commission rejected Durham's application for reasonable attorneys' fees and reimbursement of expenses,

* The Commission noted that the Staff in its brief to Judge Levy "advocated a variation of Route A." (R 7297, A 77.)

including experts' expenses, citing this Court's decision in Greene County I and the Supreme Court's ruling in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).* The Commission then reasoned:

> "Upon considering this matter further we do not find that Intervenors here have made a case for an award of expenses and fees even if we had the authority to make such an award. The Intervenors represent local towns and land owners who could conceivably have been damaged by the Gilboa-Leeds line. They had every right to present their cases as have countless other intervenors in cases before the Commission, who intervene for the benefit of local areas either because they do not desire the building of a hydroelectric project or pipeline or because they want it and the energy supplies made available. These intervenors are protecting their own interests, and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably on its ratepayers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice." (R 7297, A 84-5)

The Obdurate Attitude of the Commission Toward Petitioners

While the Durham Petitioners seek in their petition to this Court only review of the Commission's unwarranted rejection of their application for expenses and

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* In its submission to the Commission, Durham Petitioners requested an opportunity to supply detailed affidavits attesting to the reasonableness of the amounts sought (R 7107).

fees, it seems appropriate to point to other aspects of the proceeding which bear on the Administrative Law Judge's and Commission's hostile attitude toward Petitioners.

> 1. This Court in Greene County I summarized a number of the procedural difficulties Petitioners were confronted with, including the need to seek judicial relief under the Freedom of Information Act. The Court observed: ". . . we are constrained to note that the Commission at nearly every turn has made it difficult procedurally for the intervenors." 455 F.2d at 417, n.12.
>
> 2. in Greene County II, dissenting Judge Mansfield noted that (i) the Commission's "use of procedural cat-and-mouse games in an effort to avoid a final order amounts to a sham . . ."; (ii) "The twists and rebounds in the FPC's process have already taxed their [Petitioners'] financial resources."; and (iii) ". . . the FPC in its conduct of the hearing has violated both the letter and spirit of an existing Court mandate." 490 F.2d at 260-261.

The contributions that the Durham Petitioners have made, viz causing the Administrative Law Judge and the Commission to avoid selecting a transmission line route favored by both PASNY and the Staff, was accomplished notwithstanding the numerous procedural difficulties they encountered in this case.

Argument

THE COMMISSION HAS THE AUTHORITY TO MAKE A FEE AND EXPENSE AWARD AND ERRONEOUSLY FOUND THAT THE DURHAM PETITIONERS HAVE NOT MADE A CASE FOR SUCH AWARD.

The Commission has erroneously concluded that (i) it does not have the authority to pay attorneys' fees and to reimburse expenses; and (ii) the Durham Petitioners have not "made a case for an award of expenses and fees" (R 7297, A 35).

A. The Commission Has the Authority to Make an Attorney Fee and Expense Payment.

The Comptroller General of the United States, in a decision dated February 19, 1976 in Matter of Costs of Intervention - Nuclear Regulatory Commission (File B-92288) ruled that the Nuclear Regulatory Commission ("NRC") had the authority to pay the fees of attorneys and experts and related expenses of participants in nuclear licensing proceedings. By letter dated May 10, 1976, the Comptroller General advised the Congress that the "rationale" of the Comptroller General's February 19th decision to NRC is "equally applicable" to the Federal Power Commission. (Copies of the Comptroller General's February 19, 1976 decision and May 10, 1976 opinion

to Congressional Chairman John E. Moss is set forth in Addenda A and B, respectively, to this brief.)

The February 19, 1976 decision of the Comptroller General authorizes the payment of attorneys' fees, fees for experts, and related expenses of agency participants. The Comptroller General ruled:

> "We hold only that NRC has the statutory authority to facilitate public participation in its proceedings by using its own funds to reimburse intervenors when (1) it believes that such participation is required by statute or necessary to represent adequately opposing points of view on a matter, and (2) when it finds that the intervenor is indigent or otherwise unable to bear the financial costs of participation in the proceedings." Dec. p. 7 (emphasis added).

In making his ruling, the Comptroller General specifically determined that neither the Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), or this Court's decision in Greene County I "affect the Commission's [NRC's] authority to reimburse intervenors for expenses" (Dec. p. 6). Both Alyeska and Greene County I were cited by the F.P.C. in the instant proceeding as reason why an award could not be made.

As noted above, the Comptroller General in his May 10, 1976 letter opinion to Congress, advised that the

"rationale" stated in the February 19 NRC decision was "equally applicable" to the Federal Power Commission, and further provided:

> "1. Provision of funds directly to participants. With respect to your first question, appropriated funds of each agency [FPC] may be used to finance the costs of participants in agency hearings whenever the agency finds that (1) it cannot make the required dètermination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation." (Op. p. 2)

In short, the Commission, contrary to its understanding of the law, has the express authority to make the awards sought by the Durham Petitioners.

B. The Durham Petitioners Have "Made a Case" for an Award and it Was an Abuse of Discretion for the Commission to Hold Otherwise.

(1) The Commission's "Tunnel Vision" on Public Interest Participation

The Commission in Opinion 751 determined ". . . we do not find that Intervenors here [Durham Petitioners] have made a case for an award of expenses and fees . . ." (R 7297, A 85). The only reason advanced by the Commis-

sion to underpin its notion that Durham has not "made a case" is its philosophically unsound argument that towns and persons who could be "damaged" by the Gilboa-Leeds line are only "protecting their own interests . . ." and therefore, by implication, not representing the public interest. The Commission's cryptic conclusion not only is without support in the record, it is clearly contrary to the concept of public interest participation before federal agencies as expressed in a host of court decisions and by commentators.*

Indeed, Judge Mansfield of this Court, dissenting in Greene County II, recognized the fallacy in the Commission's unwarranted perspective:

> "That the cause of environmental control may redound to the particular benefit of the petitioners in no way impugns the public interest in the petitioners' enterprise, for the petitioners seek but to champion what has been declared to be national policy in NEPA." 455 F.2d at 260.

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* See, e.g., Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1965), cert. denied, 348 U.S. 941 (1966); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) and 425 F.2d 543, 546 (D.C. 1969); Gellhorn, Public Participation in Administrative Proceedings, 81 Yale L.J. 359 (1972); Cedar, Defrosting the Alyeska Chill: the Future of Attorneys' Fees Awards in Environmental Litigation, 5 Environmental Affairs (Boston College Environmental Law Center) 297 (1976); Note, Federal Agency Assistance to Impecunious Intervenors, 88 Harv. L. Rev. 1815 (1975).

Circuit Judge Harold Leventhal of the Court of Appeals for the District of Columbia recently aptly put it:

> "Administrative law and regulation have been profoundly influenced by the participation, in both agencies and courts, of public interest representatives who have identified issues and caused agencies and courts to look squarely at the problems that otherwise would have been swept aside and passed unnoticed. They have made complaints, adduced and marshaled evidence, offered different insights and viewpoints, and presented scientific, historical, and legal research. They have been of significant service to the entire decisional process." (Attorneys' Fees for Public Interest Representation, 62 ABA Journal 1134 (Sept. 1976)).

The Durham Petitioners, in this proceeding, in full measure have performed the called for "significant service."

(2) The Significant Service Rendered by Durham

The following is a summary of facts demonstrating that the Durham Petitioners "have made a case" and have been of significant service to the Commission in fulfilling its statutory responsibilities.

1. The Durham Petitioners, with the Planning Board, were responsible for bringing on for review of this Court the Commission's abdication of its responsibilities under NEPA, as determined by the Court in

Greene County I. This review was brought over strenuous objections by the Commission and PASNY.

2. The Durham Petitioners, with the Planning Board, were obligated to defend the attack on the Court's judgment in Greene County I by opposing the Certiorari Petition filed by the Solicitor General from the judgment in Greene County I.

3. The Durham Petitioners, with the Planning Board, were directly responsible for the Commission's Staff broadening the scope of its factual inquiry and analysis respecting the Gilboa-Leeds line.

4. The Durham Petitioners were required to obtain federal court enforcement of the Commission's obligation to produce documents for inspection under the Freedom of Information Act (5 U.S.C. § 552). Town of Durham v. F.P.C., (S.D.N.Y. 71 Civ. 3993) (see also comments by this Court in Greene County I [455 F.2d at 417, n.12]).

5. The Durham Petitioners at the hearings produced the only truly qualified experts to testify on the key issues (as recognized by the Commission in its Order No. 414) "of protecting and enhancing natural, historic, scenic, and recreational values at projects licensed" by the Commission. The Durham experts included:

(a) David Lowenthal, Professor of Geography at University College in London and an eminent lecturer and writer on land use, geography, environmental management and landscape evaluation;*

(b) Narendra Juneja, Assistant Professor in the Department of Landscape Architecture and Regional Planning in the Graduate School of Fine Arts of the University of Pennsylvania, recognized by the Commission Staff as "one of the distinguished architects in this country" (Tr. 3763);

(c) John Hightower, former Director of the Museum of Modern Art and former Executive Director of the New York State Council on the Arts;

(d) Vernon Haskins, the Town Historian for the Town of Durham; and

(e) David Erdmann, historian and authority on the Susquehanna Turnpike.

Durham also produced a multitude of documentary material, photographs and slides on the environmental issues (see p. 10 supra). In addition, it assisted in the preparation of Intervenor Sierra Club expert witness Alan Gussow, a professional artist, lecturer and writer on conservation and the arts.

6. The Commission's Staff noted the "contributions" to the record by the Durham experts and "conceded" that they brought into the record "new insights . . . as

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* The Commission's Staff recognized this too: "The record also indicates that Dr. Lowenthal, a learned historian and geographer, is also a gifted observer." (Staff Reply Brief to Administrative Law Judge 4/24/74, p. 13.)

to the unitary character of Durham Valley" (Staff Reply Brief, 4/24/74 pp. 13, 24).*

7. Durham brought to the agency hearing notice of the fact that the Susquehanna Turnpike (which would have been crossed in two places by proposed Route A-1) was entered on the National Register of Historic Places on January 2, 1974. Moreover, the Route A line would have run cheek by jowl with the Turnpike through the Durham Valley (Ex. 55-A, R 4474).

8. The Administrative Law Judge (who approvingly quoted from testimony by Durham witnesses Lowenthal and Juneja) determined that proposed Route A-1 was an environmentally undesirable siting, notwithstanding the Commission Staff's and PASNY's preference for that Route. The Commission agreed with the Administrative Law Judge's choice.

It is simply churlish for the Commission to find, given the whole record, that the Durham Petitioners have not "made a case." The finding is not supportable in this

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* PASNY's September 24, 1976 Response to Greene County's Motion for a Stay, filed in these appeals, states:

> "[T]he Town of Durham and some other intervenors based in Durham put on a vigorous case in an effort to demonstrate that the route chosen for the line should not be Route A which for a considerable distance traversed the Town of Durham. They called several witnesses, some of whom were very knowledgeable in the field of geography." (pp. 18-19)

record. Indeed, the Commission made no effort to find support in the record for it. The finding is, we submit, "arbitrary, capricious, [and] an abuse of discretion" and "unsupported by substantial evidence" under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (E).

C. Under the Comptroller General's Rulings, an Award Is Warranted.

We turn now to the criteria for exercise of agency discretion under the February 19 and May 10, 1976 rulings of the Comptroller General, quoted earlier and which are set forth in Addenda A and B.

(1) Inability of Intervenors to "bear the financial costs"

This factor is quoted from the Comptroller's February 19, 1976 decision (p. 7). Almost the identical test is recited in his May 10 ruling (p. 2).

The record before the Commission contained uncontroverted evidence of the fact that the Town of Durham and the Association were financially impoverished (R 5930, 6137).

(2) Necessity of Intervenors "to represent adequately opposing points of view"

This factor is set forth in the Comptroller's

February 19, 1976 Decision (p. 7) which he opined in his May 10 ruling is "equally applicable" to the Federal Power Commission. There can be no doubt whatsoever that but for the active participation at the hearing by the Durham Petitioners and the Planning Board, the Gilboa-Leeds line would have been located along Route A-1. These Petitioners -- not the Commission's Staff or PASNY -- "made the case" that Route A-1 was environmentally undesirable. Petitioners presented the "opposing points of view." The Administrative Law Judge and the Commission ultimately agreed with Durham on this significant issue.

We submit that the Commission on the fee and expense question, given the circumstances of this proceeding and the entire record, has abused its discretion under the Administrative Procedure Act and the pertinent rulings of the Comptroller General. This Court should grant the petition for review and remand for further proceedings to allow for the submission of supporting evidentiary data by the Durham Petitioners on the reasonableness of amount.

Conclusion

For the foregoing reasons, the Commission's January 29, 1976 Order respecting expenses and fees should be set aside. The Court should grant Durham Petitioners' petition for review and remand the case to the Commission directing it to hold an evidentiary hearing on the reasonableness of the amounts sought by the Durham Petitioners for reimbursement of expenses and attorneys' fees.

Respectfully submitted,

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September 27, 1976
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ADDENDUM A

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-92288

DATE: FEB 19 1976

MATTER OF: Costs of intervention--Nuclear Regulatory Commission

DIGEST: "American rule" explained in Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975) and other court cases provides that in absence of authorizing statute, neither court nor regulatory commission may shift litigation costs such as attorneys' fees among litigants. However, this rule is inapplicable to situation considered in B-139703, July 24, 1972, and current situation which involve availability of regulatory commission's appropriations to provide financial assistance to those who cannot afford to participate in commission's proceedings but whose participation is determined by commission to be necessary to full and fair proceedings.

The General Counsel of the Nuclear Regulatory Commission (NRC) has requested our decision on the following matter:

> "The Nuclear Regulatory Commission and its predecessor, the Atomic Energy Commission, have received several petitions from intervenor groups seeking financial assistance to pay the fees of attorneys and technical experts, and for related expenses of participants in nuclear licensing and rulemaking proceedings. The AEC recognized that those petitions raised a question of its statutory authority and, beyond that, broad and complex policy issues. The purpose of this letter is to request your advice whether the Nuclear Regulatory Commission possesses the legal authority to provide financial assistance to participants in its adjudicatory and/or rulemaking proceedings and, if so, under what limitations."

He advises that the Atomic Energy Commission, the NRC's predecessor agency, in its November 20, 1974 Consumers Power Company

decision (Dkt. No. 50-155) expressed itself on the issue of its authority to provide financial assistance as "tentatively inclined to the conclusion that such authority exists."

The General Counsel has provided us with a number of representative letters of opinion from both proponents and opponents of a tentative proposal to fund indigent intervenors, published by NRC in the Federal Register on August 25, 1975 (40 Fed. Reg. 37056-7). We take no position as to the desirability of funding intervenors as a matter of NRC policy. Insofar as the letters of opinion challenged NRC's legal authority to use its appropriated funds for this purpose, we have summarized the principal arguments made and have presented our views in the form of a rebuttal to each argument.

(1) The NRC may not use appropriated funds to assist intervenors in the absence of specific statutory authority therefor.

The NRC was established as an independent regulatory agency under the provisions of the Energy Reorganization Act of 1974 (88 Stat. 1242; 42 U.S.C. § 5841) and Exec. Order No. 11,834, effective January 19, 1975. The licensing and related regulatory functions formerly assigned to the Atomic Energy Commission, pursuant to the Atomic Energy Act of 1946, as amended by the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 et seq., were transferred to the NRC. Although there are a variety of NRC proceedings - e.g., NRC rulemaking, construction permit, and operating license hearings - for which intervention may be sought, according to a report commissioned by the NRC on "Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings" ("Report"), Boasberg, Hewes, Klores & Mass, July 18, 1975, "the licensing of nuclear electric generating facilities is the heart of the NRC's regulatory activities. It occupies by far the greatest amount of hearing, staff, board, applicant, and intervenor time and resources." Accordingly, we examined the legislative authority for construction permit and operating license hearings particularly. 42 U.S.C. § 2239(a) (1970) provides:

> "In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any

> proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. * * *" (Emphasis supplied.)

Clearly, NRC has ample authority to conduct a hearing and to admit as a party any one whose interests may be affected by the results of the hearing.

NRC generally receives lump-sum appropriations for salaries and expenses. For example, the most recent appropriation act, the "Public Works for Water and Power Development and Energy Research Appropriation Act, 1976," Pub. L. No. 94-180, December 26, 1975, simply provides:

> "For necessary expenses of the Commission in carrying out the purposes of the Energy Reorganization Act of 1974 * * *."

While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Gen. 621 (1927); 17 id., 636 (1938); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973).

The question, of course, is whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe only the administering agency can make that determination. We note that NRC's regulatory authorities are extremely broad. As the court pointed out in Siegel v. Atomic Energy Commission, 400 F.2d 778, 783 (1968), Congress enacted "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives."

In view of the above, if NRC in the exercise of its administrative discretion, determines that it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose. This is essentially the same rationale we followed in our decision B-139703, July 24, 1972, in which we held that the Federal Trade Commission (FTC) had authority to pay certain expenses incurred by indigent respondents and intervenors appearing before the Commission in adjudicative proceedings.

(2) The Comptroller General's decision to the Federal Trade Commission, on which the NRC relied in reaching its "tentative conclusion" in its Consumers Power decision, has been overruled by enactment of the "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act."

The "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act," Pub. L. No. 93-637, 88 Stat. 2183, was enacted on January 4, 1975. Section 202(a) of that Act added a new subsection 18(h) to the Federal Trade Commission Act which provides:

> "(h)(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.
>
> "(2) The aggregate amount of compensation paid under this subsection in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either (A) would be regulated by the proposed rule, or (B) represent persons who would be so regulated, may not exceed 25 percent of the aggregate amount paid as compensation under this subsection to all persons in such fiscal year.

"(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed $1,000,000."

This provision was added to the Act by the House-Senate conference committee and there is no pertinent legislative history. However, we believe it is likely that since the new statute substantially formalized FTC's rulemaking procedures, the conferees wished to formalize the compensation allowable for intervenors as well, in order to enable them to participate more freely in the proceedings. The new provision broadened the class of persons and expenses eligible for financial assistance and placed overall restrictions on the use of FTC's appropriations. We do not feel that enactment of this provision was intended to overrule or modify the basis of our 1972 decision so as to reflect on its precedent value in dealing with agencies for which Congress has not enacted a similar statutory provision.

(3) The Congress affirmatively declined to authorize the NRC to pay the expenses of intervenors by deleting a Senate amendment to the Energy Reorganization Act of 1974 which would have provided such authority.

During consideration of the bill which was eventually enacted into the Energy Reorganization Act of 1974, Pub. L. No. 93-433, 88 Stat. 1233, an amendment was introduced by Senator Kennedy which would have specifically provided NRC for a period of 3 years with authority to pay expenses of intervenors. 120 Cong. Rec. S15050-15054 (daily ed., August 15, 1974). The amendment was adopted by the Senate but later deleted by the conference committee. In taking that action, the conference committee states in its report:

"Title V (section 501) provided that the Commission should reimburse parties in Commission proceedings for reasonable attorneys' fees. The Commission was to set a maximum amount allowed for each proceeding. The amounts paid were to be based upon the extent to which the party contributed to the development of facts, issues, and arguments relevant to the proceeding, and upon the party's ability to pay his own expenses.

"The conferees agreed to delete /this section/. The deletion of title V is in no way intended to express an opinion that parties are or are not now entitled to some reimbursement for any or all costs

> incurred in licensing proceedings. Rather, it was felt that because there are currently several cases on this subject pending before the Commission, it would be best to withhold Congressional action until these issues have been definitively determined. The resolution of these issues will help the Congress determine whether a provision similar to title V is necessary since it appears that there is nothing in the Atomic Energy Act, as amended, which would preclude the Commission from reimbursing parties where it deems it necessary." (Emphasis added.)

H. Rep. No. 93-1445, 93d Cong., 2d Sess. 37 (1974). We do not agree that the deletion of the Senate amendment indicated congressional intent to deny the NRC authority to reimburse intervenors. On the contrary, it appears that the members of the conference committee felt that although they wished to await NRC's final position on the matter, quite possibly specific legislation would not be necessary to authorize such financial assistance since they believe that the Atomic Energy Act as amended already contains the necessary authority.

(4) Recent cases have made it clear that there can be no authority to reimburse participants in the absence of a specific statutory provision.

The three cases cited most frequently by opponents to reimbursement authority are Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975); Turner v. Federal Communications Commission, 514 F.2d 1354 (D.C. Cir. 1975); and Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972). The NRC General Counsel also asks specifically whether these cases affect the Commission's authority to reimburse intervenors for expenses. We do not believe they do.

In Alyeska, environmental groups had sued to stop construction of the trans-Alaska pipeline on the grounds, inter alia, that the Secretary of the Interior was violating the National Environmental Policy Act. The court below had ordered attorneys' fees taxed against Alyeska on the theory that the Society had acted as a private attorney general, vindicating important rights of all citizens and ensuring that the governmental system functioned properly. The Supreme Court reversed, noting that Congress had specifically permitted shifting of attorneys' fees despite the contrary "American rule" in a variety of circumstances, and holding that such specific statutory authorization was a requisite to

recovery. The Court further defined the "American rule" as precluding the prevailing litigant from ordinarily being entitled to collect a reasonable attorney's fee from the loser.

In Turner, intervenors appealed from an order of the FCC denying their request that the licensee which sought a renewal of its license be ordered to reimburse their legal expenses. The court said, "Congress has no more extended a 'roving commission' to the FCC than it has to the Judiciary 'to allow counsel fees as costs or otherwise whenever the . . . /Commission/ might deem them warranted'." The court then concluded that, before an agency may order a litigant to bear his adversary's expenses, it must be granted clear statutory power by Congress.

In Greene County, the petitioner/intervenor was successful in compelling the agency to take a broader view of its National Environmental Policy Act (NEPA) responsibilities. Nonetheless, on the question of awarding intervenor financing, the court held that "we find ourselves in agreement with the Commission's position that . . . without a clear congressional mandate we should not order the Commission or PASNY /Power Authority of the State of New York/ to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings." (Emphasis added.) In both the Alyeska and Turner cases, plaintiffs, the prevailing parties, sought to force their adversaries to pay their costs, including reasonable attorneys' fees. All the court did, in our view, is to uphold the "American rule," that in the absence of a statutory provision to the contrary, neither a court nor a regulatory commission may shift the costs from one litigant to the other. In the Greene County case, the court said it had no power to order either the opposing litigants or the agency to pay the costs of the intervenors.

In the matter before us, we are not considering whether NRC has the authority to determine whether one participant in its proceedings should pay the expenses of the other, nor are we concerned with whether the persons to whom financial assistance is extended prevail. There is also no question of compelling NRC to pay the expenses of any of the parties. We hold only that NRC has the statutory authority to facilitate public participation in its proceedings by using its own funds to reimburse intervenors when (1) it believes that such participation is required by statute or necessary to represent adequately opposing points of view on a matter, and (2) when it finds that the intervenor is indigent or otherwise unable to bear the financial costs of participation in the proceedings.

Notwithstanding the above, we believe it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation, as was done in the case of the FTC by the "Magnuson-Moss" Act, supra. We note that the Joint Committee on Atomic Energy is currently considering S. 1665, 94th Congress, which would accomplish the same objectives as the Kennedy amendment discussed, supra. In addition S. 2715, 94th Congress, which would provide general authority for payment of expenses of intervenors in proceedings subject to the Administrative Procedures Act, 5 U.S.C. § 551 et seq. (1970) as well as in specified types of litigation is now before the Senate Committees on Government Operations and Judiciary.

The NRC has asked that, in addition to deciding the question of its authority to pay costs of intervention directly to participants, this Office advise it as to the legality of expenditure of appropriated funds on certain other forms of assistance to intervenors suggested in chapter VI, "Alternatives to Direct Intervenor Financial Assistance" of a report on "Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings," prepared for the Commission by the law firm of Boasberg, Hewes, Klores and Kass ("Report").

The discussion of alternatives to direct financial assistance to intervenors in the report is wide ranging and includes numerous suggestions, described in varying degrees of detail. Since it is our understanding that the Commission is not actively engaged in implementing any of these alternatives at this time we will not attempt to discuss each one. We will limit our comments to the following observations on the suggestions we consider to be of greatest significance in the context of availability of NRC funds for expenditure.

Procedural Cost Reductions. Section 201(f) of Pub. L. No. 93-438, supra, transferred to NRC all of the licensing and related regulatory functions formerly performed by the Atomic Energy Commission (AEC). With respect to licensing authority, chapter 10 of the Atomic Energy Act of 1954, 68 Stat. 919, 936, approved August 30, 1954, 42 U.S.C. §§ 2131 et seq. (1970) provided that licenses should be issued by the AEC in accordance with chapter 16 of that Act, now codified at 42 U.S.C. §§ 2231 et seq. Under the authority provided by 42 U.S.C. § 2133 NRC is empowered to issue commercial licenses for nuclear utilization and production facilities "subject to such conditions as

the Commission may by rule or regulation establish to effectuate the purposes of this chapter." We believe this authority provides NRC with general powers to issue, modify and change its procedural regulations as it chooses to accomplish the functions it is required to perform with respect to issuance of commercial licenses. Certainly, nothing prevents the Commission from simplifying procedures and eliminating unnecessary or unduly burdensome requirements which increase the cost to parties of participating in licensing proceedings. This suggestion, thus, poses no legal problems.

Access to Technical Information and Staff. As part of the suggested procedural cost reductions, the "Report" proposes that NRC provide public participants, including intervenors, with what is described as "in house technical expertise," by granting participants access to technical information and staff, page 135, "Report." As to this suggestion we note that the conferees on the legislation which became Pub. L. No. 93-438, supra, deleted two sections of the Senate bill, S. 2744, 93d Congress, as passed by the Senate. Section 206 would have provided parties in NRC proceedings with technical assistance and made available studies and reports prepared or to be prepared by or for the Commission, the Energy Research and Development Administration or any other Federal agency, subject to existing laws concerning disclosure. NRC was to fund this assistance and then seek reimbursement unless the party was unable to provide it. Section 209 would have amended the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 et seq., to provide the public generally with information concerning safety factors. These sections were adopted by the Senate in floor debate, Cong. Rec., daily edition, August 15, 1974, pp. S15034-15047. The conferees did not explain the deletion of these provisions. See House of Representatives Conference Report 93-1445, supra., p. 37.

NRC must clearly provide such information as provided for by the FOIA. It may provide for easier access to such information. Currently, for example, NRC requires that public participants receive copies of all documents related to a particular facility simultaneously with their receipt by the NRC staff or other parties.

On the other hand, it does not appear that NRC has authority to allow access to its staff to provide a participant's technical expertise. The staff is to serve NRC's needs and may not be used to prepare or assist, other than incidentally, those taking an adversary position in NRC's proceedings.

Provision of Public Counsel. Under the broad mandate to NRC to issue commercial licenses for the utilization and production of atomic materials "subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter" (chapter 10 of the Act of August 30, 1954, as amended, supra, 42 U.S.C. § 2133(a) (1970)), it would appear that the Commission has considerable regulatory flexibility. Thus, as discussed above, if the Commission should find it necessary to the commercial licensing process to establish some form of assistance to participants, including intervenors, who otherwise could not afford to participate, it may do so.

Certainly, however, no authority exists for NRC to supply funds for an independent Public Counsel outside of the regulatory agency as described in pages 136-138 of the "Report." The "Report" states that at present there is nothing at the Federal level which could be called an independent Office of Public Counsel. We agree with the suggestion on page 138 that the Commission could recommend enactment of legislation to establish special, publicly funded counsel for assistance to participants and intervenors if this appears to be desirable. Proposals for a Consumer Protection Agency are currently being considered by the Congress.

Independent Intervenor Assistance Centers. The comment made above with respect to provision of public counsel is applicable to this suggestion also. Although we believe the Commission's authority to administer the Atomic Energy regulatory scheme is sufficient to allow provision of some form of assistance to participants, it does not have authority to use its appropriation to finance independent entities not within the jurisdiction and control of the agency where the purpose of those entities is to assist adversary participants in NRC's proceedings.

R.F.KELLER

for Comptroller General
of the United States

ADDENDUM B

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-180224

MAY 10 1976

The Honorable John E. Moss, Chairman
Oversight and Investigations Subcommittee
Committee on Interstate and Foreign Commerce
House of Representatives

Dear Mr. Chairman:

This refers to your letter in which you request the advice of this Office, with respect to nine agencies of the Government under study by the Subcommittee on Oversight and Investigations, as to whether public participants in proceedings before those agencies may be assisted in any or all of the following ways:

> "(1) the provision of funds directly to participants, (2) modification of procedural rules so as to ease their financial burden on public participants, (3) provision of technical assistance by agency staff, (4) provision of legal assistance by agency staff, (5) creation of an independent public counsel, and (6) creation of a Consumer Assistance Office such as that now employed by the FCC."

The agencies to which you refer are the Federal Communications Commission, the Federal Trade Commission, the Federal Power Commission, the Interstate Commerce Commission, the Consumer Product Safety Commission, the Securities and Exchange Commission, the Food and Drug Administration, the Environmental Protection Agency, and the National Highway Traffic Safety Administration.

Your letter refers to our decision in the Matter of Costs of Intervention, Nuclear Regulatory Commission (NRC), B-92233, February 19, 1976, to the NRC (hereafter referred to as the NRC decision) in which we considered the legality of providing similar types of assistance to participants and intervenors in NCR rulemaking and licensing proceedings.

Due to the time constraints established by the terms of your request, we have not solicited comments and views of the agencies concerned on the questions your letter poses. However, we have examined, with respect to

each agency, some of the statutory and/or regulatory authorities which authorize or direct that public hearings be held for a variety of purposes related to accomplishment of the agency mission. We find that each agency has authority to request participation by members of the general public in its proceedings, either as parties or intervenors, although there are individual differences in the extent to which such participation would be likely to be required.

Finally, we could discover no statutory prohibition against the provision of any of the types of assistance about which you have inquired.

We thus conclude that there is no significant difference in the relevant authorities for the nine agencies you named and in those of the NRC. Accordingly, the rationale of our February 19 decision to NRC is equally applicable to each agency named.

1. Provision of funds directly to participants. With respect to your first question, appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that (1) it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation. It should be noted that the Federal Trade Commission (FTC) has specific statutory authority, provided by section 202(a) of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183, approved January 4, 1975, to provide compensation for expenses of participation for persons appearing before it. This provision is discussed on pages 4 and 5 of our aforementioned decision.

We would like to emphasize, however, that it is within the discretion of each individual agency to determine whether the participation of the particular party involved is necessary in order for it to properly carry out its functions and whether the party is indigent or otherwise unable to finance its participation. No party has a right to intervene at Federal expense unless the agency so determines.

Finally, for the reasons set forth in the NRC decision, we believe it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation, as was done in the case of the Federal Trade Commission by the provisions of section 202(a) of the "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act," supra.

2. Modification of procedural rules so as to ease their financial burdens on public participants. For the reasons stated with respect to NRC in the NRC decision, we find nothing in the laws of any of the agencies considered to prevent simplification of procedures and the elimination of unduly burdensome requirements which increase the cost of participation by parties involved.

3. Provision of technical assistance by agency staff. For the same reasons given under "Access to Technical Information add Staff" in the NRC decision with respect to NRC, the same access to technical expertise may be made available by each agency. As we stated with respect to NRC, this would not extend to the assignment of agency staff members to participants in the role of individual technical advisors for the purpose of advancing the position of a particular party.

4. Provision of legal assistance by agency staff. To the extent a participant needs factual information concerning legal aspects of a proceeding, such as explanations of procedures or examples of documents required to be filed, we believe agency staff members can provide this. However, agency staff could not be permitted to act in the capacity of advocates for a participant.

5. Creation of an independent public counsel. We believe nothing precludes an agency from having its staff present information to the agency's decisionmaking bodies concerning the public interest or consumer viewpoints in the course of a proceeding in order to call attention to relevant opinions not expressed by parties representing private interests. However, no agency could use its appropriations to establish an independent entity outside its jurisdiction and control.

6. Creation of a Consumer Assistance Office such as that now employed by the FCC. On March 19, 1976, the Federal Communications Commission (FCC) announced the formation of a new Consumer Assistance office. According to a press release from FCC:

> "This office will provide a central location or coordinating point within the Commission for members of the public, citizens groups and FCC licensees who seek information or assistance.
>
> * * * * *
>
> "The Consumer Assistance Office represents another step in the FCC's efforts to ensure prompt and accurate

response to inquiries and to enhance public understanding of the Commission's policies and regulations.

* * * * *

"Any person or group wishing information about the Commission's rules, matters pending or material explaining FCC policies and regulations may contact one of the full-time staff members of the Office.

"The Office also will provide information assistance to persons who wish to participate in the Commission's processes or file an application with the FCC but who are unfamiliar with the procedures to be followed.

"Finally, the Office will help prepare attractive and easy to understand brochures explaining Commission regulations and how best to comply with them."

We have been informally advised by staff of the FCC that this office is not in any way intended to act as an advocate for consumers. It does not include in its staff attorneys or professional experts in other fields. Its function is, basically, that of providing the public with factual information. We are not aware of anything which would preclude any of the agencies named in your letter from establishing a similar office.

We might also point out that our NRC decision would also be applicable to agencies other than the ones mentioned in your letter, assuming that there was no specific legislative prohibition against it, provided that the particular agency holds hearings at which it has the discretion as to whom to admit as participants or intervenors; has appropriations available to pay for "necessary expenses" to carry out the missions for which the hearings are being held; and makes the determinations mentioned in the immediately preceding paragraph. This is also true of the other types of assistance mentioned herein.

Sincerely yours,

R.F. KELLER

Deputy Comptroller General
of the United States

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK and ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

-against-

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK,

Intervenor.

76-4151, 4153

AFFIDAVIT OF SERVICE

- -

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARILYN KOLINSKI, being duly sworn, deposes and says:

I have this day served two copies of the within Brief For Petitioners Town Of Durham And Association For The Preservation Of Durham Valley on the following persons by depositing the same properly enclosed in a post-paid wrapper, in a depository regularly maintained by the United States Postal Service in New York County, New York addressed to their respective addresses:

Robert J. Kafin, Esq.
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10 Columbus Circle
New York, New York 10019

Philip R. Telleen, Esq.
Federal Power Commission
Washington, D.C. 20426

Marilyn Kolinski

Sworn to before me this
27th Day of September, 1976

Andrea F. Gatti

ANDREA F. GATTI
Notary Public, State of New York
No. 31-4506477
Qualified in New York County
Commission Expires March 30, 1977

76-4151, 4153

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GREENE COUNTY PLANNING BOARD, et al.,
Petitioners,

-against-

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK,

Intervenor.

AFFIDAVIT OF SERVICE

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